

1 Craig Labadie
City Attorney
2 State Bar No. 101681
1950 Parkside Drive, MS/08
3 Concord, CA 94519
(925) 671-3160 (phone)
4 (925) 671-3469 (fax)
Email: clabadie@ci.concord.ca.us

5 Robert L. Falk, State Bar No. 142007
6 MORRISON & FOERSTER LLP
425 Market Street, 32nd Floor
7 San Francisco, CA 94105
(415) 268-7000 (phone)
8 (415) 268-7522 (fax)
Email: Rfalk@mofo.com

9
10 BEFORE THE
11 STATE WATER RESOURCES CONTROL BOARD
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14 IN THE MATTER OF WASTE DISCHARGE
15 REQUIREMENTS FOR THE SAN
FRANCISCO BAY MUNICIPAL REGIONAL
16 STORMWATER PERMIT (MRP), NPDES
PERMIT CAS612008

CITY OF CONCORD'S PETITION FOR
REVIEW OF REGIONAL WATER
QUALITY CONTROL BOARD - SAN
FRANCISCO BAY REGION ORDER
NUMBER R2-2009-0074

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19 **I. INTRODUCTION**

20 The City of Concord, California ("Petitioner")¹ hereby submits this Petition to the California
21 State Water Resources Control Board ("State Water Board") pursuant to section 13320(a) of the
22 California Water Code (the "Water Code"), requesting that the State Water Board review an action
23 by the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional
24 Water Board"). Specifically, Petitioner seeks review of the Regional Water Board's October 14,
25 2009 Municipal Regional Storm Water Permit Order No. R2-2009-0074, reissuing NPDES Permit

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27 ¹ Pursuant to the requirements of Cal. Code Regs. tit. 23 § 2050(a)(1), the Petitioner may be
28 contacted through the persons identified on the above caption.

1 No. CAS612008 (the “MRP”)². Petitioner is not seeking immediate review of this Petition and
2 instead requests that it be held in abeyance pending further notice by Petitioner to the State Water
3 Board in the event that Petitioner wishes to request that the review process be activated. Petitioner is
4 one of 76 cities, towns, counties and other public entities subject to the MRP. As such, it is aggrieved
5 by the procedural and substantive legal defects in the MRP described below.

6 After several iterations and nearly five years of work by its staff, permittees, and other
7 stakeholders, the Regional Water Board inexplicably and abruptly cut short Petitioner’s rights to
8 meaningful public participation in the permitting process. On September 24, 2009—less than three
9 weeks before the meeting at which the full Regional Water Board adopted the MRP—the Regional
10 Water Board staff published what it then termed a “Final Tentative Order.”³ In addition, the Fact
11 Sheet (98 pages) was not released until October 7, 2009, and Response to Comments Received on the
12 December 2007 Tentative Order (451 pages) and Response to Comments Received on the February
13 2008 Tentative Order (676 pages) were not released until October 5, 2009. The Final Tentative
14 Order imposed numerous new substantive requirements that had not appeared in the last version
15 made available for public comment in February 2009.

16 The changes were significant. Indeed, one witness advocating for the new provisions at the
17 October 14, 2009 hearing described their addition to the MRP as “historic.” The new terms—
18 including the far-reaching so-called “low impact development” or “LID” provisions and extensive
19 new requirements for trash capture—are heavily prescriptive, impose substantial new financial
20 burdens on Petitioner and other local governments that are subject to the MRP, and could even entail
21 temporal, longer term and or cumulative consequences that adversely affect the environment on the
22 whole. Yet the Regional Water Board did not adequately address these and other issues and didn’t

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24 ² A copy of Order R2-2009-0074 may be accessed via the internet at
25 http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/adopted_orders/2009/R2-2009-0074.pdf. As the Order and its attachments are 279 pages, a hardcopy is not being provided
26 concurrently with this Petition but will be provided to the State Water Board upon its further request
should that be deemed necessary.

27 ³ The final actually-adopted version of the MRP, containing additional changes in text, was
28 not made available until the day before the hearing.

1 even allow the public to submit additional written comments analyzing or providing evidence
2 concerning the new requirements in the Final Tentative Order. Instead, Petitioner and most other
3 participants were allotted only five minutes each at the Regional Water Board's October 14, 2009
4 hearing to verbally explain their positions and lodge objections.

5 In addition to these and other serious defects, the Regional Water Board's adoption of the
6 MRP is legally inappropriate and invalid in a number of respects, including the following:

- 7 • The Regional Water Board's assertion that various MRP Provisions are required by the
8 "maximum extent practicable" ("MEP") standard set forth in the federal Clean Water Act
and its implementing regulations is not sufficiently supported by findings;
- 9 • In fact, some of the MRP requirements *exceed* the federal MEP standard, thereby
10 triggering legal obligations for the Regional Water Board to have conducted additional
11 analysis of technical feasibility and economic and environmental impacts under section
13241 of the California Water Code and the California Environmental Quality Act, none
of which were adequately performed before adoption of the MRP;
- 12 • Some of the new requirements in the MRP—including the LID and structural trash
13 capture requirements—are so prescriptive that they effectively specify the means and
method of compliance in violation of Water Code section 13360; and
- 14 • The MRP illegally contains provisions extending beyond the maximum five-year term of
15 an NPDES permit, as limited by Water Code section 13378.

16 These defects render the MRP inappropriate and invalid and require action —preferably by means of
17 a remand to the Regional Water Board— by the State Water Board pursuant to its authority under
18 Water Code section 13320(c).

19 As set forth in more detail below, these (and many other) objections to the MRP have been
20 raised before the Regional Water Board before it acted, as will be reflected in the record to be
21 assembled.⁴

22 I. FACTUAL AND PROCEDURAL BACKGROUND.

23 A. Federal and State Statutory Scheme.

24 The discharge of pollutants in storm water is governed by Clean Water Act Section 402(p),
25 which governs permits issued pursuant to the National Pollutant Discharge Elimination System

26 ⁴ Petitioner reserves the right to supplement and expand upon this Petition if it is taken out of
27 abeyance and once the record had been assembled.

1 (“NPDES”). 33 U.S.C. § 1342(p). With respect to a municipality’s discharge of storm water from a
2 municipal separate storm sewer system (“MS4”), Section 402(p)(3)(B) provides:

3 Permits for discharges from municipal storm sewers –

- 4 (i) may be issued on a system or jurisdiction-wide basis;
- 5 (ii) shall include a requirement to effectively prohibit non-storm
6 water discharges into the storm sewers; and
- 7 (iii) shall require controls to reduce the discharge of pollutants to the
8 maximum extent practicable, including management practices,
9 control techniques and system, design and engineering methods,
and such other provisions as the Administrator or the State
determines appropriate for the control of such pollutants.

10 33 U.S.C. § 1342(p)(3)(B).

11 California is among the states that are authorized to implement the NPDES permit program.
12 33 U.S.C. § 1342(b). California’s implementing provisions are found in the Porter-Cologne Water
13 Quality Control Act. *See* Water Code §§ 13160 and 13370 *et seq.* Respondent State Water Board is
14 designated as the state water pollution control agency for all purposes stated in the Clean Water Act.
15 Water Code § 13160.⁵ State and Regional Water Boards are authorized to issue NPDES permits.
16 Water Code § 13377. NPDES permits are issued for terms not to exceed five years. *Id.* § 13378
17 (“Such requirements or permits shall be adopted for a fixed term not to exceed five years.”).

18 Thus, when a Regional Water Board issues a NPDES permit, it is implementing both federal
19 and state law. Permits issued by a Regional Water Board must impose conditions that at are at least
20 as stringent as those required under the federal act. 33 U.S.C. § 1371; Water Code § 13377. But,
21 relying on its state law authority or discretion, a Regional Water Board may also impose permit limits
22 or conditions in excess of those required under the federal statute as “necessary to implement water
23 quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” Water Code §
24 13377.

25

26 ⁵ Water Code Sections 13160 and 13370 *et seq.* reference the Federal Water Pollution Control
27 Act. After the Federal Water Pollution Control Act was amended, it commonly became known as the
28 Clean Water Act.

1 The Water Code requires the Regional Water Board, when issuing NPDES permits, to
2 implement “any relevant water quality control plans that have been adopted, and shall take into
3 consideration the beneficial uses to be protected, the water quality objectives reasonably required for
4 that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section
5 13241.” Water Code § 13263(a). Section 13241 requires the consideration of a number of factors,
6 including technical feasibility and economic considerations. *Id.* § 13241.

7 Courts have read these provisions together to mean that the Regional Water Board cannot rely
8 on the requirement for consideration of economic conditions under section 13241 as justification for
9 imposing conditions that are *less stringent* than those required under the federal Act. *City of Burbank*
10 *v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 626-27 (2005). However, nothing in the
11 federal or state statutory scheme prohibits consideration of economic factors in fashioning permits
12 that *meet* federal standards. *Id.* at 629 (J. Brown, concurring). And as implied by the remand order
13 issued by the court in the *City of Burbank*, sections 13236 and 13241 together *require* that economic
14 factors must be considered when imposing conditions that exceed federal requirements. *Id.* at 627
15 n.8 & 629 (remanding to the trial court “to decide whether any numeric limitations, as described in
16 the permits, are ‘more stringent’ than required under federal law and thus should have been subject to
17 ‘economic considerations’ by the Los Angeles Regional Board before inclusion in the permits”).

18 Permit conditions that are imposed pursuant to state law reaching beyond the mandatory
19 requirements of the federal Clean Water Act would also trigger review of their environmental impact
20 under the California Environmental Quality Act, Pub. Res. Code § 21000 et seq. (“CEQA”).⁶
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25 ⁶ Issuance of NPDES permits as required to implement the Clean Water Act are exempt from
26 CEQA’s requirement of preparation of an environmental impact report for all projects that are
27 expected to have a significant environmental impact. Water Code § 13389. But municipal storm
28 water permits that contain provisions exceeding the “maximum extent practicable” standard set by
the federal Clean Water Act fall outside the exemption established by section 13389.

1 **B. Procedural Requirements**

2 **1. Public participation.**

3 NPDES permits may be issued only “after opportunity for public hearing.” 33 U.S.C.
4 § 1342(a)(1). Indeed, public participation is a fundamental —and non-discretionary— component of
5 issuing a NPDES permit:

6 Public participation in the development, revision, and enforcement of
7 any regulation, standard, effluent limitation, plan, or program
8 established by the Administrator or any State under this Act ***shall be***
 provided for, encouraged, and assisted by the Administrator and the
 States.

9 33 U.S.C. § 1251(e) (emphasis added). Thus, among other things, federal regulations require a state
10 permitting agency to provide at least 30 days for public comment on a draft NPDES permit. 40
11 C.F.R. § 124.10(b)(1). This is particularly critical for a permit such as the MRP that has taken so
12 long in its development and applies to so many Permittees

13 The federal regulations also require at least 30 days advance notice of a public hearing on
14 adoption of a draft NPDES permit. *Id.* § 124.10(b)(2). Adjudicative hearings held by the Regional
15 Water Board in consideration of an NPDES permit are governed by the Regional Water Board’s own
16 regulations, 23 Cal. Code Reg. § 648 et. seq., Chapter 4.5 of the Administrative Procedure Act
17 (commencing with § 11400 of the Government Code), sections 801-805 of the Evidence Code, and
18 section 11513 of the Government Code. *See* Cal. Code Regs., tit. 23, § 648(b). Government Code §
19 11513 provides that each party shall have the right to call and examine witnesses, to introduce
20 exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though the
21 matter was not covered in direct examination, to impeach any witness, and to rebut the evidence
22 against the party. Government Code § 11513(b). The Regional Water Board’s procedural
23 regulations also establish the right of a party in an adjudicative hearing before the Regional Water
24 Board to present evidence and cross-examine witnesses. Cal. Code Regs, tit. 23, § 648.5(a).

25 The issuing agency is required to respond to comments received during the comment period
26 by: (1) specifying which, if any, provisions of the draft permit have been changed in the final permit,
27 and the reasons for the change; and (2) briefly describing and responding to all significant comments
28

1 on the draft permit raised during the public comment period or at the any hearing on the permit. 40
2 C.F.R. § 124.17(a).

3 **2. Legally sufficient findings.**

4 Because issuing an NPDES permit is an adjudicative action, the Regional Water Board is
5 required to make “legally sufficient findings” in support of its conclusions. *See In re Petition of*
6 *Pacific Water Conditioning Assn., Inc.*, State Water Board Order WQ 77-16, at *7 (citing *City of R.*
7 *P. Verdes v. City Council of R. Hills, etc.*, 59 Cal.App. 3d 869, 129 Cal. Rptr. 173 (1976); *Merced*
8 *County Board of Supervisors v. California Highway Com'n*, 57 Cal.App. 3d 952, 129 Cal.Rptr. 504,
9 (1976); *Myers v. Board of Supervisors of Cty. of Santa Clara*, 58 Cal.App. 3d 413, 129 Cal.Rptr. 902,
10 (1976).) Adequate findings assure that the permit is the result of careful consideration of the record
11 before the agency and facilitates review. *Topanga Assn. for a Scenic Community v. County of Los*
12 *Angeles*, 11 Cal. 3d 506, 516-517 (1974).

13 In the context of a NPDES permit, particularly one that imposes conditions beyond the
14 requirements of federal law, such findings must, at a minimum, demonstrate that such conditions are
15 necessary to protect specific beneficial uses. *Southern Cal. Edison Co. v. State Water Resources*
16 *Control Bd.*, 116 Cal. App. 3d 751, 758-59 (1981) (rejecting conditions in an NPDES permit based
17 on the State Ocean Plan that were unsupported by findings that such standards were “necessary to
18 protect *specific beneficial uses* . . . The absence of such evidence makes it impossible to determine
19 whether stricter regulations than those found in the Ocean Plans are in fact “necessary.”)

20 **II. ARGUMENT**

21 **A. The Regional Water Board’s Adoption of the Final MRP Was**
22 **Procedurally Defective.**

23 **1. The Regional Water Board provided insufficient notice of the**
24 **October 14, 2009 hearing on the Final Tentative Order.**

25 The MRP is the culmination of nearly five years of work by the Regional Water Board,
26 permittees, and stakeholders. The process has been iterative, and the Regional Water Board has
27 established a pattern of allowing time between iterations to facilitate public participation. The first
28 draft permit was published for notice and comment on December 14, 2007. This was followed by a
public workshop held by the Regional Water Board in March 2008. Nearly a year later, on February

1 11, 2009, the Regional Water Board produced a revised draft. On May 13, 2009, the Regional Water
2 Board held a public hearing to discuss revisions to the December 2007 draft. At each preliminary
3 stage of the permitting process, the Regional Water Board provided sufficient notice and solicited
4 public comment on revisions from the prior draft in keeping with the public participation
5 requirements in the federal statute and regulations. 33 U.S.C. § 1251(e); 40 C.F.R. § 124.10(b)(2).

6 However, at the final stage, the Regional Water Board abruptly departed from its prior efforts
7 to provide for meaningful public participation. On September 24, 2009, the Regional Water Board
8 published a new "Final Tentative Order" reissuing the MRP, to be proposed for adoption by the full
9 Regional Water Board at its regularly scheduled October 14, 2009 meeting. Not only did this
10 truncated notice period deprive Petitioner and other stakeholders of a full and meaningful opportunity
11 for comment and participation, it failed to provide 30-day mandatory advance notice required under
12 the federal regulations. 40 C.F.R. § 124.10(b)(2) ("Public notice of a public hearing *shall be given at*
13 *least 30 days before the hearing.*") (emphasis added).)

14 **2. The Regional Water Board deprived Petitioner of the opportunity**
15 **to comment on substantive new requirements in the MRP.**

16 There is no dispute that the September 24 Final Tentative Order contained significant
17 substantive changes from the February 2009 draft that was the subject of the Regional Water Board's
18 May 2009 hearing, or that the changes will result in additional costs and burdens on permittees. (See
19 Appendix B to Final Tentative Order, showing changes from February 2009 tentative order.)⁷ The
20 new draft also replaced some more flexible provisions of the draft tentative orders that provided
21 continuity from past permit requirements with more prescriptive and inflexible requirements. For
22 example, for new development and redevelopment projects, the Final Tentative Order included the
23 following new LID-only requirements:

- 24 • A requirement that 100 percent of water quality design storm runoff from
25 regulated projects be treated onsite through a handful of prescribed methods, with
26 alternatives such as biotreatment allowed only where the permittee can
demonstrate that the preferred methods are infeasible;

27 ⁷ Provision C.3.c. regarding LID was nearly completely rewritten and Provision C.10
28 regarding Trash Load Reduction was replaced in its entirety.

- A requirement that the municipal permittees produce a report determining feasibility or infeasibility of LID measures within the next 18 months;
- A requirement that the municipal permittees propose an LID treatment reduction Special Project credit system within one year for projects that have demonstrated environmental benefits to allow a portion of the storm water runoff onsite to be treated by non-LID, or so-called “conventional,” treatment measures.⁸

(Final Tentative Order, sections C.3.c(i)(2)(b); C.3.c(ii); C.3.e(ii).)

The Final Tentative Order also introduced, without more meaningful opportunity for comment or analysis, prescriptive and burdensome new structural requirements for the capture and containment of trash. Regional Water Board staff acknowledged that these new provisions would be costly to permittees; it estimated that the associated capital cost alone will be around \$28 million dollars over the permit term, and further admitted that it has identified only \$5 million in available funds. (Appendix D to Final Tentative Order, at p. 6.)

Despite the extensive and substantive nature of the changes from the February 2009 tentative order, the Regional Water Board accepted no further written public comments or evidence. Instead, participation by the permittees who would be subject to these burdensome new requirements was limited to five minute oral testimony at the Regional Water Board’s October 14, 2009 hearing on the MRP. (Transcript of October 14, 2009 Hearing (hereinafter “Tr.”). The Regional Water Board’s statement that these revisions were the “outgrowth of comments” submitted by Permittees and other interested persons is not accurate, is an oversimplification of the changes, and does not justify the refusal to allow written comments on these revisions.

During the hearing, members of the Regional Water Board and the witnesses who testified agreed that the new provisions were significantly different from the draft discussed at the May 2009 hearing. (*See, e.g.*, Tr. at p. 31 (comments of Mr. Moore: “particularly between the pilot project work you just discussed, and the low impact development requirements. Because I think they both progressed very – on a pretty significant pace since May.”) A witness for a group favoring the new trash provisions testified that the changes were not just significant but “historic.” (Tr. at p. 78

⁸ This could relate to Brownfield Sites, low income housing, senior citizen housing, transit oriented development projects and other infill or redevelopment projects.

1 (comments of David Lewis: "This is a big improvement from May. *And we call these historic*
2 *changes . . .*".)

3 Yet despite the nature, scope, and burdens of these new and controversial provisions and the
4 failure of the Regional Water Board to allow written comments, each interested entity was allowed
5 only five minutes to speak, and was encouraged by the chair to limit remarks to less than three
6 minutes. (Tr. at p. 51) Permittees who wished to present more than one witness were required to
7 split their five-minute allotment among those witnesses. (*Id.*) The only exception was granted to a
8 witness appearing on behalf of one group that favored the new provisions. This witness was allotted
9 ten minutes. (*Id.* at p. 92.) While the Regional Water Board staff was allowed to respond to all
10 comments with no time limit, and was questioned by the members of the Regional Water Board, no
11 additional time was allotted for Permittees to question staff directly or to submit additional evidence.
12 (*See, e.g.,* Tr. at p. 82 (refusing to allow a witness to provide the Regional Board with a copy of
13 written comments).)

14 Witnesses who appeared on behalf of Permittees objected to the imposition of these costly,
15 burdensome and inflexible new provisions being added so late in the process and without the
16 opportunity to provide more detailed comments, and testified to the lack of available public resources
17 to fund them. (*See, e.g.,* Tr. at p. 102 (comments of Melody Tovar: "We do look at the new draft,
18 though, and note some new changes in the permit, and that the revised draft was not circulated for
19 public review and comment, and we think it should have been. For us, that means that my testimony
20 here today does not benefit from the direction and feedback from our City Council, and that is
21 something we have thoughtfully done for every draft of this permit."); *see also,* Tr. at pp. 58, 83, 85,
22 111-113, 121-22, 129.)

23 Under similar circumstances, the State Water Board has expressed concern that such
24 proceedings were insufficient to assure that all participants were allowed adequate opportunity to be
25 heard:

26 But we are concerned that at the . . . hearing, interested persons and
27 permittees *were not given adequate time to review late revisions or to*
28 *comment on them.* Given the intense interest in this issue, *the Regional*
Water Board should have diverged from its strict rule limiting
individual speakers to three minutes and conducted a more formal

process. Such a process should provide adequate time for comment, including continuances where appropriate.

In re The Cities of Bellflower et al., State Water Board Order WQ 2000-11, at *24 (Oct. 5, 2000) (emphasis added). In the *Bellflower* case, the State Water Board admonished Regional Water Boards to employ the proceedings for hearings set forth in section 648 of the Regional Board's regulations. *Id.* at *24 n.25 ("For future adjudicative proceedings that are highly controversial or involve complex factual or legal issues, we encourage regional water boards to follow the procedures for formal hearings set forth in Cal. Code of Regs., tit. 23, section 648 et seq.") Those regulations require the Regional Water Board to allow interested parties the opportunity to cross-examine witnesses and present contrary evidence. Cal. Code Regs, tit. 23, § 648.5(a). The Regional Water Board here ignored the State Water Board's admonition. As a result, Petitioner has thus far been denied the right to full and fair participation in the permitting process, as required under both federal and state law. 33 U.S.C. § 1351(e); *Bellflower*, WQ 2000-11. It should not be overlooked that these requirements apply to 76 Permittees in the San Francisco Bay Region that in itself provides for very complex and controversial issues.

3. The Regional Water Board Failed to Adequately Respond to Comments on its Prior Draft Tentative Orders.

Federal permitting regulations require that states issuing NPDES permits seek, consider, and provide responses to public comments on draft permits. 40 C.F.R. § 124.17(a). The Regional Water Board failed to provide timely responses to comments submitted on its draft tentative orders, and ignored or, at most, gave lip service to many comments suggesting pragmatic modifications that would, among other things, help avoid wasting resources and/or mitigate the economic impacts of the MRP on fiscally stressed municipalities.⁹ The Final Order indeed includes hundreds of pages of

⁹ Despite prior specific direction from Regional Water Board members to the staff to expedite getting responses to previously submitted written comments issued following the May 2009 hearing on the February 2009 revised tentative order, the *only* responses to written comments submitted over the five-year course of the MRP's development (totaling well over 1,000 pages) were issued less than 10 days prior to the Regional Board's October 14, 2009 adoption hearing further depriving Petitioner and others of a meaningful public participation opportunity.

1 charts containing purported responses to written comments received on earlier iterations of the MRP.
2 (See Appendices E and F of Final Order.)¹⁰ However, a closer examination of it reveals that it is
3 insufficient. Each comment is summarized in a few sentences, and the responses are often limited to
4 two or three words. (*Id.*) Few, if any, meaningful changes were made in response to comments
5 submitted. In other words, despite providing a voluminous and nice-looking chart, the responses
6 were substantively too little and too late to be meaningful as is required by law.

7 To better illustrate these deficiencies, a few illustrative examples of substantive and important
8 issues that were not adequately addressed in the Regional Water Board's responses to comments are
9 discussed below.

10 Comments submitted by the Santa Clara Valley Urban Runoff Pollution Prevention Program,
11 for example, requested that the Regional Water Board's requirement for an initial desktop feasibility
12 analysis of the provisions set forth in sections C.11 and C.12 of the February 2009 draft be used as a
13 screening mechanism to determine whether and to what extent the pilot diversions should be
14 required. (Appendix F, at p. 438-39.) This suggestion – which would have saved public resources by
15 providing an equivalent amount of information with less paperwork – was ignored: all five pilot
16 diversion studies are mandated in the Final Order, *regardless of the outcome of the initial feasibility*
17 *analysis*. (*Id.*) In light of the overwhelming evidence of financial distress suffered by municipal
18 permittees in this economic environment, opportunities for added efficiencies are of critical
19 importance to the permittees, taxpayers, and the Regional Water Board as a public entity. The
20 Regional Water Board's failure to meaningfully respond to this suggestion is an example of its
21 procedural failures in considering and responding to public comments.¹¹

22 ¹⁰ The Final Order and all associated documents are available at
23 http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/stormwater/mrp.shtml.

24 ¹¹ Likewise, the Santa Clara Program submitted comments on Provision C.15 of the MRP
25 noting that it had previously developed and obtained approval of a comprehensive non-stormwater
26 discharge management program. It asked the Regional Water Board staff to explain why that
27 program was no longer adequate or could not simply be grandfathered, thereby saving significant
28 public resources while continuing to protect water quality; it also asked the staff to explain where the
existing program had failed to protect water quality. The response fails to provide any data or
analysis, merely paying lip service to these important points while attempting to put the ball back in
the municipalities' court. *Id.* at 502-503

1 In addition, with respect to new and redevelopment requirements, several Permittees provided
2 evidence that vault-based systems for on-site treatment of storm water are effective in removing
3 pollutants and that there are situations in which these types of controls represent the maximum
4 practicable level of treatment. (*See, e.g.,* Comments of Santa Clara Valley Urban Runoff Pollution
5 Prevention Program (“SCVURPPP”), at pp. 4-5; Comments of the Alameda Countywide Clean
6 Water Program, and Comments of the City of Dublin, at p. 7.) The Regional Water Board staff
7 responded by asserting – without providing an evidentiary basis or citation to EPA regulations or
8 permitting guidance (since none exists) – that LID measures, rather than the vault-based systems,
9 represent the “maximum extent practicable” because they address a broader range of pollutants and
10 provide other benefits. (Response to Comments on February 2009 Draft.) This response is
11 inadequate because it assumes, rather than finds with adequate support, that LID measures are
12 “practicable.” Indeed, as discussed in more detail below, the Regional Water Board has effectively
13 admitted that it has no factual basis for such a conclusion by requiring the Permittees to study the
14 very *feasibility* of LID measures imposed in the MRP.

15 A number of commenters also requested more time for implementation of new requirements
16 in the February 2009 draft MRP based on the impacts that the new provisions for development and
17 redevelopment projects in that version of the permit would have on existing Hydromanagement
18 (“HM”) programs that are already being implemented by Permittees. In the response to comments,
19 the Regional Water Board indicated that it had accommodated this request by moving all immediate
20 deadlines back. (Appendix E to Final Tentative Order, at pp. 2-3.) However, because the Final
21 Tentative Order fails to acknowledge that the new MRP will have an immediate effect on changing
22 the requirements in some existing HM programs, no such revision was made to the deadlines for their
23 implementation. (Final Tentative Order C.3.g.ii(5); C.3.a.ii.) While the response therefore facially
24 responds to the comment in question, its identification of changes made in response is inaccurate and
25 misleading, and it is therefore inadequate and legally insufficient.

26 Each of these examples raises a significant point of importance to Permittees, and, more
27 important, only exemplifies the widespread and pervasive set of deficiencies in the Regional Water
28 Board’s response to comments and compliance with mandatory public participation requirements.

1 The Regional Water Board staff's responses to many of the comments submitted were either
2 dismissive, non-existent, based on a mischaracterization of evidence before the Regional Water
3 Board, inaccurate and misleading, or non-responsive to the issue presented. None satisfies the
4 requirement for a reasonable response. 40 C.F.R. § 124.17.

5 **B. The Final MRP Is Legally Defective.**

6 The Final MRP fails to satisfy the requirements of federal and state law governing the
7 issuance of an NPDES permit. Two of the new provisions included in the final MRP – the LID and
8 trash provisions – are highlighted below. While the defects discussed here may also affect other
9 permit provisions, these two were the focus of much of the testimony presented at the October 14,
10 2009 hearing, and are used here as illustrations.¹²

11 **1. The Regional Water Board's imposition of LID measures and new**
12 **requirements for trash capture are not supported by legally**
sufficient findings and cannot be supported on the record before it.

13 The federal Clean Water Act requires storm water discharges to be controlled to the
14 "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). This term is not defined in the
15 federal statute or its implementing regulation, but has been interpreted by the U.S. Environmental
16 Protection Agency and courts to require imposition of best management practices, or "BMPs."
17 *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999).

18 Neither the Final Tentative Order, nor the Final Order as approved by the Regional Water
19 Board, contains any additional findings supporting its conclusion that the new LID measures required
20 under the Final MRP represent the "maximum extent practicable." Indeed, the evidence before the
21 Regional Water Board was to the contrary. As the Regional Water Board staff admitted, the
22 permittees uniformly testified that the new requirements would be difficult and expensive to
23 implement, and may well be out of reach. (*See e.g.*, Tr. at pp. 53-54, 58, 83, 121-122, 125.) As one
24

25 ¹² Comments in the record submitted by and on behalf of Bay Area municipalities raise the
26 issues to which this section of the Petition is addressed with respect to many other requirements of
27 the MRP, including, but not limited to: Provisions C.3 (e.g., C.3.g, C.3.i), C.8 (e.g., C.8.d.iii, C.8.f),
28 C.9e, C.11 (e.g., C.11.e, C.11.f, C.11.h, C.11.i, C.11.j), C.12 (e.g., C.12.e, C.12.f, C.12.h, C.12.i),
C.13 (e.g., C.13.e), and C.14. Should this Petition be removed from abeyance, Petitioner reserves the
right to elaborate on these and the illustrations above.

1 Regional Water Board member summarized succinctly: "Well, the state of the economy, or the state
2 of the cities is such that, really, going backward, they cannot have it, they cannot afford it." (Tr. at p.
3 159.)

4 To find the basis for the Regional Water Board's implementation of these requirements, one
5 must instead "grope through the record to determine whether some combination of credible
6 evidentiary items which supported some line of factual and legal conclusions supported the ultimate
7 order or decision of the agency," in contravention to the requirement for clear and explicit findings.
8 *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 516-517 (1974).

9 A search for such findings would also, in this instance, prove fruitless. Instead of evidence-
10 based findings, the Regional Water Board staff simply asserts in a separate document that "LID is
11 rapidly being established as the maximum extent practicable (MEP) standard for new and
12 redevelopment stormwater treatment." (Staff Report, at p. 2.)¹³ In fact, even this somewhat
13 equivocal and unsupported statement is belied by the very conditions of the final MRP, which
14 1) requires permittees to conduct studies of whether the LID measures required under section C.3 of
15 the MRP are feasible (Final MRP at C.3.c.i(2)(b)(iv)-(v).), and 2) requires a proposal from
16 Permittees to support LID treatment reduction credits for Special Projects. (Final MRP at
17 C.3.e.ii.(1)&(2)). The fact that the Regional Water Board deems such studies necessary confirms that
18 it is not in possession of sufficient evidence to conclude that these measures are "practicable." Thus,
19 inclusion of these studies in the MRP is a tacit admission that the Regional Water Board *cannot* make
20 legally sufficient findings to support its conclusion that LID represents MEP. In corollary, to make
21 such findings would be an admission that the required studies were excessive and unnecessary.
22 Indeed, the Regional Water Board's insertion of these requirements into the MRP before it has the
23 supporting data is based on speculation, not evidence.

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26 ¹³ Even if this rationale were sufficient and supported by evidence, a statement in the Staff
27 Report or other supporting document cannot substitute for findings in the permit. *In re City and
28 County of San Francisco et al.*, State Board Order WQ 95-4, at pp. *28-29 (Sept. 12, 1995).

1 **2. The Regional Water Board has failed to perform the analysis of**
2 **countervailing economic factors required under State law.**

3 Having failed to establish that LID is necessitated by the federal MEP standard, the Regional
4 Water Board has also failed to make any findings that would support a conclusion that LID measures
5 ~~are necessary or appropriate under state law. Indeed, the evidence on the record would not support~~
6 such findings.

7 Imposition of LID measures based solely as a measure that is more stringent than required
8 under federal law triggers the need for additional analysis. *City of Burbank v. State Water Resources*
9 *Control Bd.*, 35 Cal. 4th 613, 626-27, 629 (2005). As a start, the Regional Water Board would have
10 to undertake a careful analysis of technical feasibility and economic reasonableness of its proposed
11 requirements. Water Code §§ 13241(d), 13263(a). It did not do so. In fact, at least one member of
12 the Regional Board expressed the strong belief that the LID provisions as written were too inflexible
13 to be feasible, especially in the urban infill context that many of the permittees will have to address.
14 (Tr. at pp. 36-37.)

15 Numerous witnesses also provided testimony about the economic unreasonableness of the
16 MRP's requirements given the tenuous financial conditions facing municipal permittees. Addressing
17 the permit's extensive monitoring requirements, one witness in particular testified in detail about the
18 dire short-term and long-term economic realities facing elected officials and the taxpayers who must
19 fund the studies and other mandatory provisions in the new MRP, rebutting the Regional Water
20 Board's belief that deferring the most expensive provisions to the end of the permitting period would
21 alleviate such concerns:

22 This is great, we have a five year permit, we can look forward to the
23 future, the bar has been raised; but I caution all of you, as an elected
24 official, and you all know in your own communities, the budgetary
25 considerations are not just ending at the end of this year, they are going
26 to be next year, the year after. Concord alone will have \$9.7 million
27 more we will have to cut. We just lost close to 78 employees, 20
28 percent of our workforce. We will be cutting again more staff. So
 these monitoring requirements [are] still of concern, a very large
 concern, because the amount of money it is going to take to [conduct]
 these studies, even though they are spread over a period of time, you
 are still talking anywhere from \$6 to \$43 million in capital costs
 throughout the permit over that five years to address some of the issues
 identified in those studies, possibly, and you are talking about \$12, 15,

1 18 million of studies, of getting data. . . . I think, in reality, I want to go
2 on record that you may hear from us in another year or two, saying,
3 "You know what? There is not enough money to do all the studies that
4 you ask for in the time frame that you put out in this permit."

(Tr. at 111-113.)

5 Against this same fiscal backdrop, the Regional Water Board staff itself also estimated that
6 the new trash capture requirements will carry a capital cost price tag of \$28 million, and admitted that
7 they had identified only \$5 million dollars in public resources available to fund implementation.

8 (Staff Report, at p. 6.)

9 While the record is replete with such acknowledgements by the Regional Water Board that
10 the new requirements (LID, trash capture, monitoring, and others) are costly and burdensome, it does
11 not contain any actual analysis by staff of costs against the environmental benefit to be gained by
12 their imposition.¹⁴ For this reason, and on this record, the requirements are unsustainable under State
13 law.

14 Moreover, the Regional Water Board has not made any specific findings supporting the
15 conclusion that these new requirements are necessary to maintain any specific beneficial use tied to
16 local receiving waters. Instead, for LID, for example, the Regional Water Board simply points in a
17 staff report to storm water permits adopted in *other regions* that have implemented "extensive
18 requirements for LID measures." (Staff Report, at p. 6.) It also failed to consider how the more
19 extensive new and redevelopment controls and hydromodification requirements implemented in the
20 permittees' jurisdictions as a result of their prior permit compliance may already be adequate to
21 achieve protection of beneficial uses (as their prior permits' findings determined they would). This
22 "fire, aim, ready" approach is simply not sufficient to justify permit conditions in excess of those
23 required under federal law. *Southern Cal. Edison Co. v. State Water Resources Control Bd.*, 116 Cal.
24 App. 3d 751, 758-59 (1981).

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27 ¹⁴ Municipalities submitted many such analyses; but these were dismissed or ignored.
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1 **3. The Regional Water Board has not analyzed the broader**
2 **environmental impacts of the new requirements.**

3 More than one witness testified at the October 14, 2009 hearing that the imposition of rigid
4 new LID requirements could actually have an *adverse* environmental impact, by discouraging
5 environmentally responsible infill projects. (*See, e.g., Tr. at 121-23*: “We have strong concerns that
6 fully implementing this requirement on certain types of projects will be very difficult. In fact,
7 complying with the LID requirement as it is written may not be possible for some projects and may
8 deter responsible redevelopment.”) Witness testimony also supported revisions to the Final
9 Tentative Order suggested by Regional Water Board members to allow greater flexibility in choosing
10 from among environmentally sound treatment methods by eliminating language in the permit that
11 discourages the use of biotreatment. (*See, e.g., Tr. at pp. 105, 120, 124, 130.*) These revisions were
12 not included.

13 Because these provisions relating to LID and trash removal exceed MEP, they are not exempt
14 from the requirements of CEQA pursuant to section 13389 of the Water Code. Thus, these and other
15 potential environmental impacts of these provisions must be analyzed before they may be applied
16 solely pursuant to the authority provided under state law.

17 **4. The new LID provisions violate the prohibition on specifying the**
18 **means of compliance.**

19 Throughout the MRP development process, a number of commenters and witnesses objected
20 to the prescriptiveness of this permit. For example, the replacement in the final MRP of more
21 flexible approaches to responsible development that have previously been endorsed by the State
22 Water Board with more rigid, proscriptive LID requirements that severely limit options available to
23 permittees in planning new development and redevelopment projects was the subject of specific
24 testimony at the October 14 adoption hearing. (*See, e.g., Tr. at pp. 60-61.*) At least one Regional
25 Water Board member admitted at that hearing that he felt the Regional Water Board was “treading in
26 dangerous territory here, from my perspective, in specifying the method and means of compliance.”
27 (*Tr. at p. 171.*) The member was correct. The Water Code expressly prohibits permit terms that
28 specify the means of compliance. Water Code § 13360 (“No waste discharge requirement or other

1 order of a regional board or the state board or decree of a court issued under this division shall
2 specify the design, location, type of construction, or particular manner in which compliance may be
3 had with that requirement, order, or decree, and the person so ordered shall be permitted to comply
4 with the order in any lawful manner.”).¹⁵

5 **5. The MRP contains provisions extending beyond the permit term.**

6 Finally, the Final MRP identifies several items extending its reach well beyond the MRP’s
7 five-year term. For example:

8 The Permittees shall demonstrate compliance with Discharge
9 Prohibition A.2 and trash-related Receiving Water Limitations through
10 the timely implementation of control measures and other actions to
11 reduce trash loads from municipal separate storm sewer systems
(MS4s) by 40% *by 2014*, 70% *by 2017*, and 100% *by 2022* as further
specified below.

12 (Final MRP, at section C.10 (emphasis added).) The MRP is effective December 1, 2009. By law,
13 an NPDES permit term cannot exceed five years. Water Code § 13378. For this reason, only the
14 2014 date referenced above is legally valid and those extending beyond it should be stricken from the
15 final MRP. When the MRP or another successor NPDES permit is reissued, the Regional Water
16 Board can reassess the necessity, feasibility, and cost of additional reduction goals and impose any
17 incremental increase as supported by the evidence before it at that time.

18 **III. SERVICE OF COPIES PETITION ON REGIONAL BOARD.**


19 Copies of this Petition have been served on the Regional Water Board and on all other
20 Permittees other than the Petitioner.

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25 ¹⁵ The LID requirements are again illustrative. First, they require all covered development
26 projects to treat 100% of storm water on site. (Final MRP, section C.3.c.i(2)(b).) This requirement
27 clearly specifies the “location” of treatment in contravention of section 13360. In addition, by
28 eliminating the use of underground vaults or bioremediation except where none of the prescribed
treatment methods are feasible, the MRP is specifying the design and type of construction, as well as
the manner of compliance. (*Id.*)

1 **IV. CONCLUSION.**

2 For all of the reasons set forth above, and others which may be raised in other petitions or by
3 a further review of the record once it is assembled and if this Petition is taken out of abeyance, the
4 Final MRP is both procedurally and legally defective.

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6 Dated: November 12, 2009

7
8 By: 
9 Craig Labadie
10 City Attorney
11 City of Concord, California
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